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*International Journal of Digital Television* (copyright Intellect), 2011, 2(1): 51-68.

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# Co-regulation, video-on-demand and the legal status of audio-visual media

Daithí Mac Síthigh<sup>\*</sup>

This is the final draft of an article subsequently published in the  
*International Journal of Digital Television* (copyright Intellect), 2011, 2(1): 51-68.

**Abstract:** *Media regulation in the United Kingdom has traditionally seen a division between State regulation (in the case of broadcasting) and self-regulation (in the case of newspapers), both subject to laws of general application. However, co-regulation has emerged as a significant feature of contemporary regulation of the media, particularly in relation to video-on-demand (VOD). This article considers the various stages of consultation and implementation of the European Union's Audiovisual Media Services Directive (AVMSD) in the United Kingdom. A proposal for a new approach to categorizing and analysing relevant statutory provisions and regulatory arrangements that pertain to audio-visual media including VOD is made. Other issues are explored, including methods of regulation, technological and organizational developments in the media industries, and the impact on community media and the film industry. It is argued that the AVMSD did not resolve all issues in relation to the scope of regulation, and that even the most recent developments in the launch of co-regulation highlight the diverse forms of media regulation now in force.*

## A. Introduction

### 1. The audio-visual media environment and the role of regulation

Assessing the regulation of video-on-demand (VOD) is a difficult task. From the perspective of the viewer, much of the VOD content on cable and IPTV (Internet Protocol TV) services in the United Kingdom is no more than repackaged content already broadcast on linear television in the same jurisdiction. However, with much of the development in VOD in

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recent years falling on the Internet alone or in conjunction with other services, it is now the case that debates regarding VOD are not just about specialist services, but instead closely linked to broader issues surrounding Internet regulation. These developments are driven by ‘catch-up’ TV (European Audiovisual Observatory 2008) as well as other services. The consumer preference for services that are based on the browser rather than separate players has been important in the success of Hulu (Rose 2008), a managed service supported by broadcasters as an alternative to user-generated services like YouTube. The European Commission finds that ‘most’ of the estimated 600 on-demand services across the European Union (still much fewer than the 4000-odd linear services) use the Internet or IPTV for distribution (2009: 4), rather than cable, satellite or non-Internet mobile. Therefore, the definition as well as the regulation of VOD is a live and urgent question.

In this article, the implementation of the European Union’s Audiovisual Media Services Directive (AVMSD) in the United Kingdom is assessed, to test the strength of the definitions of on-demand services included in the Directive and also to consider the relationship between different forms of audio-visual media service, including those not within the scope of the Directive. The European Union’s role in the law of television broadcasting is one of harmonization rather than direct regulation, with member states obliged to transpose the Directive into domestic law by whatever means deemed appropriate. The Directive affects the law of many jurisdictions, but it is also an example of the change in regulatory approaches to new media. Three trends in the development of television broadcasting and related media have been identified by others: democratization of the media more generally (i.e. that more people can create and distribute audio-visual media than ever before), the work of the TV industry to ‘hierarchize the value of images’ and protect its market, and new players such as YouTube finding a way to generate income (Marshall 2009: 46). All three of

these points have been of influence in the development of the EU response through the AVMSD, and so its approach is of interest beyond the European Union as a thorough legal ‘answer’ to recent developments in media and technology.

A particular feature of implementation has been the use of what is termed ‘co-regulation’. The work of the Hans-Bredow Institute (Schulz and Held 2001, Hans-Bredow-Institut 2006) has confirmed the range of co-regulatory and self-regulatory models in the European Union. Although a number of definitions of this term are in circulation, the important one for present purposes is that of the European Union institutions, since this Directive, as many others do, encourages the use of co-regulation. Two particular attempts to articulate what co-regulation is are of value. The first is a statement of principle (but not detail) in an inter-institutional agreement on better lawmaking, adopted in 2003 by the European Parliament, the European Commission and the Council of the European Union (Official Journal 2003). This describes co-regulation as a method of implementing EU law, where the ‘attainment of the objective’ defined by the appropriate legislative body is entrusted to ‘parties which are recognized in the field (such as economic operators, the social partners, non-governmental organizations, or associations)’. In this statement, a distinction is made between co-regulation and self-regulation, the difference being the existence of a particular legislative act of some sort. The second is that contained in the Directive itself. Member states are ‘encouraged’ to use co-regulation as ‘a legal link between self-regulation and the national legislator’ in accordance with national legal traditions with ‘the possibility of State intervention in the event of its objectives not being met’ (recital 36). The mere existence of co-regulation is not the only issue, with Cave et al. setting out an 11-point ‘Beaufort scale’ of regulation (2008: 27), based on a study of media regulatory bodies across a number of jurisdictions. On this scale, a distinction is drawn between ‘approved compulsory’ and ‘scrutinized’ co-regulatory

systems, alongside a Government-imposed compulsory body, with other bodies commonly grouped as self-regulatory varying quite widely depending on funding and oversight. The model chosen in the United Kingdom is therefore of a type encouraged by the European Commission. Its development is of wider interest outside of the United Kingdom, especially as a significant number of the broadcast services currently regulated in the United Kingdom are essentially directed at other EU states.

## **2. The directive**

The purpose of the Directive was to modernize the European law on television broadcasting, first found in the 1989 Television Without Frontiers Directive. The process began with the European Commission's draft of 2005, which brought into focus the division between what were then termed linear and non-linear audio-visual media services, replacing the idea of *television* broadcasting that had up to then been the concern of the earlier Directives. The UK legislation, the Communications Act 2003, had reflected this approach through an explicit exclusion of both VOD and Internet services in general. The Commission's initial approach was based on some measure of technological neutrality, meaning that linear services would be regulated in the same way (whether they were terrestrial broadcasts or live streams on the Internet). Non-linear services would be regulated too, to a lesser degree than linear services, again without regard to the method of delivery.

The AVMSD was the result of a prolonged debate, and the eventually adopted Directive 2007/65 uses language of 'television' and 'on-demand', with a range of recitals purporting to reassure the various industries that a light touch was the prevailing approach. Although recitals are not legally binding in the conventional fashion, they are frequently used to

provide an explanation as to the purpose or motivation of a particular legislative act. The country-of-origin provisions that are familiar as the tool by which Television Without Frontiers operated are applied to all services. These provisions mean that member states apply the harmonized European regulations to all operators within their territory, and can apply certain additional regulations to such operators, but cannot normally regulate those services already regulated in the member state of origin. Key substantive regulatory requirements (using the new numbering of the consolidated Directive 2010/13) include the following.

- Applying to all audio-visual media services: *identification of service providers* (article 5) and *prohibiting incitement to hatred* (article 6)
- Applying to all services in a similar fashion, but with separate provisions for linear and on-demand: *protection of minors* (articles 27 and 12, respectively)
- Less intensive regulation of on-demand services as compared to linear services: *advertising* (generally applicable provisions in article 9 cover issues such as surreptitious techniques and discrimination, while articles 19–26 add linear-only restrictions relating to issues like time and sequencing) and *the promotion of European productions* (article 13 requires member states to ensure such ‘where practicable’ in respect of on-demand, but article 16 requires a majority of transmission time on linear services to consist of European productions).

Some provisions do not apply to on-demand services in any fashion; an example is the ‘right of reply’ clause in article 28. Further clauses specifying that on-demand services would need to be subject to editorial responsibility and would have to be TV-like were inserted to reassure some member states expressing concerns through the Council of Ministers. It then

fell to the member states to implement the AVMSD by December 2009, which all but a few did on time.

Although not all programming will be directly or even indirectly affected by a given restrictive provision in broadcasting law, the study of the restrictions is important in its own right. As Leverette argues, the features of television as a medium over a long period have been influenced by the technological, political and cultural limitations that broadcasters face (2009: 124). Indeed, when legislation for cable was introduced in the United Kingdom over 25 years ago, it took a liberal (i.e. deregulatory) approach to quality and impartiality but maintained a position of moral conservatism on taste and decency (Hollins 1984: 284), and the new UK government proposes further deregulation in coming years (DCMS 2010). It is not surprising that the AVMSD, and in particular its provisions regarding on-demand media, pays little attention to ‘positive’ regulation of media (requirements regarding quality, diversity, representativeness) while retaining aspects of ‘negative’ regulation, particularly for controversial or explicit programming. The latter reflect the challenge of ‘new’ media to ‘old’ regulation. Early cable-only and pay-TV services in the United States such as ‘HBO’ (Santo 2009: 23; Leverette 2009: 125) and ‘Showtime’ (Hollins 1984: 183) presented material that was more ‘risqué’ than what would then have been permitted on network television. On-demand services from the experimental Qube service in the early 1980s (Hollins 1984: 194) to the Canal Play web-based version of the French movie service ‘Canal+’ (Augros 2008) found that pornographic content was the most popular. The challenge of VOD and the AVMSD is that existing regulation may not be capable of application without customization, and the existence of a ‘less regulated’ alternative may call into question the prevailing regulatory approach.



## **B. A classification of audio-visual media in the United Kingdom**

It is important to recognize that although the focus of the AVMSD debate may have been on the distinction between linear and non-linear (e.g. Onay 2009; Newman 2009), between non-linear service and those entirely beyond its scope (e.g. Valcke and Stevens 2007), the full range of audio-visual media in a state like the United Kingdom includes further distinctions. The following categorization may demonstrate the importance of this broader approach. The proposal is to classify audio-visual media into a number of categories, with only categories A and B within the scope of the AVMSD. Not all of the categories are the subject of this article, but this broader picture helps explain the limits to the categories of particular interest.

	<b>Type</b>	<b>Summary definition</b>	<b>UK regulation</b>	<b>Notes</b>
A	Television (linear)	Linear services under the AVMSD.	Communications Act, Broadcasting Code (through Ofcom). Licensed under the Act as specific channels, as Television Licensable Content Services or Digital Television Programme Services.	For specific channels, which have public service obligations (i.e. ‘ITV’, ‘Channel 4’ and ‘Channel 5’), there are additional requirements, e.g statutory requirements for ‘Channel 4’, bespoke rather than template licenses, further restrictions on advertising. The BBC

				Trust plays a particular role in respect of BBC services. There are (now very limited) exceptions for services not targeted at the United Kingdom, and also distinctions made between editorial, teleshopping and self-promotional services, beyond the scope of this classification.
B	On-demand (non-linear)	Non-linear services under the AVMSD	Communications Act, and the new ATVOD system discussed later in this article.	
C1	Video/DVD (unless exempt)	Video works found on video recordings: Video Recordings Act 1984 (VRA).	VRA, classified by the British Board of Film Classification (BBFC)	Subject to prior scrutiny and age ratings, but limited to physical distribution. No distinction between video, DVD and related formats. Some

				<p>special conditions</p> <p>apply through the 1984 Act and also the amendments in the Criminal Justice and Public Order Act 1994 expressed as providing protection against ‘harm’. A small number of video works are exempt, e.g. most music/sport.</p>
C2	Cinema for public exhibition	Cinema for public exhibition.	Voluntary BBFC ratings, enforced through the Licensing Act 2003 and local authorities.	<p>This could be a separate heading, but given the strong link provided by the BBFC as dual regulator, and the normal consistency (despite the legislative differences) between the cinema and video schemes, it forms a part of type C.</p>
D	Video	Video games found	The VRA as	Note that this could be

	games  (unless exempt)	on video recording  (Video Recordings Act 1984)	amended by the  Digital Economy Act 2010, to be  regulated through  the Video Standards Council, applying a  version of the self- regulatory Pan- European Games Initiative (PEGI)  standards.	considered as an aspect  of category C, but the  new statutory  provisions inserted in the VRA by the Digital Economy Act and the  very different approach of PEGI suggests that  this is more  appropriately  considered as a  separate stream (Mac Síthigh 2010). This  system is not expected  to come into force until  April 2011.
E	Audio-visual services provided by a  newspaper on its website.		Regulated by the  Press Complaints Commission under its Guidance Note (Press Complaints Commission 2007).	Some (but certainly not all) of these services could fall into category B, although this is a matter of some dispute at present.
F	Other audio-visual services not  falling into any of the categories above.		Subject to general law and – at least in theory  – the minimalist requirements of the Electronic Commerce Directive, 2000/31/EC.	

The advantages to the service provider of classification as type B have already been noted. For example, the provider of a type B service has greater flexibility than a type A provider when it comes to raising revenue through advertising, being permitted to use product placement and to schedule commercial breaks as it chooses. It is no surprise, then, that an analysis in a marketing trade publication suggested that broadcasters concerned about product placement restrictions should take some comfort from the ability to sell placement opportunities without restriction for catch-up and on-demand services (Fernandez 2009). While this still presents some technological challenges (lessening due to changing methods of production and editing), it is also a potentially lucrative opportunity, particularly as other subsequent sales (e.g. DVD, certain foreign sales) can also use unrestricted placement. Type A is the only format to restrict product placement, however, so this ‘advantage’ is not exclusive to type B. However, a particular advantage of type B is that, as for Type A, under the European system of media regulation discussed above, the country of origin and freedom of reception principles normally guarantee unrestricted access to the markets of all other EU member states.

At present, it appears as if the number of regulators remains an issue for audio-visual media in the United Kingdom, with new regulatory systems now found under types B and D as compared with five years ago. As Levy argued in 2001, even if there were to be a single regulator replacing a number of diverse regulators, this would not necessarily reduce the ‘number of the multiple and sometimes contradictory objectives’ that they must pursue (Levy 2001: 155). The United Kingdom did merge a number of bodies into the new super-regulator Ofcom in the 2003 Act (addressing Levy’s point that at the turn of the century, there were fourteen statutory and self-regulatory bodies in the United Kingdom (2001: 33)), but the

present situation is still one of a wide range of regulatory bodies of various types. Millwood-Hargrave and Livingstone suggest that in respect of media content, there are seventeen regulatory bodies in operation in the United Kingdom (2009: 34-5), although not all of these bodies deal with the audio-visual services considered in this article. On the other hand, the British Board of Film Classification (BBFC) has argued that a diversity of regulators is itself a method of protecting freedom of expression (British Board of Film Classification 2008: 8).

## **C. The Directive in the United Kingdom**

### **1. Implementation in the United Kingdom and the role of co-regulation**

The journey of the AVMSD within the United Kingdom is at the core of this case study. Although the AVMSD deals with a number of matters requiring action by member states, the focus here is on dealing with on-demand audio-visual media services. Following a first consultation in 2008, a 2009 ministerial statement set out the Government's proposals for implementing the Directive. The most important for this discussion is the decision that Ofcom would be given the legislative powers to arrange co-regulation of VOD, mentioning (but not confirming) the expectation that arrangements associated with the Association for Television on Demand (ATVOD) could be a basis for co-regulation. The statement also set out a clearer expectation that the Advertising Standards Association would be responsible for regulating advertising within on-demand services, a decision not considered in this article.

Subsequently, Ofcom carried out a detailed consultation on the question of VOD alone (Ofcom 2009a), with ATVOD again identified as the preferred co-regulator, subject to further negotiation and structural reforms. The Department prepared secondary legislation to transpose the requirements of the Directive into UK law, amending (by way of the powers

contained in the European Communities Act) the Communications Act 2003. A VOD Editorial Steering Group (VESG) has played a role in developing the ATVOD system and is referred to by various parties in their submissions and by Ofcom itself. Little is known regarding its role and minutes of its deliberations have not been published, although it was assisted by Ofcom and the Department (Ofcom 2009b: 85) and its membership included broadcasters, associations (e.g. the Mobile Broadband Group), service providers like BT and Sky, studios/producers, and both ATVOD and the BBFC (Periodical Publishers Association 2009: 7). Ofcom's final statement in December 2009 confirmed that discussions with ATVOD were continuing, making a number of changes to the draft guidance in a final regulatory framework (Ofcom 2009b). The key aspect of this framework is non-binding 'Scope Guidance', drafted with the assistance of the VESG. The actual designation of ATVOD as the regulator for VOD was made by Ofcom in March 2010.

It has been pointed out, correctly, that the Directive does not require co-regulation, but merely encourages it, as well as forms of self-regulation (e.g. Lievens 2006: 114). It does appear to preclude fully autonomous self-regulation, however, and it is on this basis that the UK Government and Ofcom have proceeded. Prosser suggests that the ambitions of the Commission to encourage self-regulation met a number of objections from different directions, some arguing that it was inappropriate to refer to it at all and others suggesting that the effect might be to restrict self-regulation (2008: 108–111). However, for a state such as the United Kingdom that expressed serious scepticism regarding the extension of regulation to VOD, having explicitly excluded it from the 2003 Act and campaigned against it at European level during the negotiation of the AVMSD, co-regulation has obvious appeal.

Ofcom's current working understanding of co-regulation is that such schemes involve 'elements of self- and statutory regulation, with public authorities and industry collectively administering a solution to an identified issue' (Ofcom 2009b: 10). While this approach is an adequate one, it is also somewhat simplistic, and can be contrasted with the multiple levels of the 'Beaufort scale', or the very detailed specification for Internet co-regulation under the Broadcasting Services Act in Australia. These provisions set out a range of provisions regarding codes of conduct, the respective roles of the State and others, and certain aspects of the substantive rules on content. It is notable, though, that the method of implementing the AVMSD in the United Kingdom starts from the position of considering co-regulation as the *ab initio* solution, and some of the issues below flow from this approach. The risk of the early move to co-regulation is that the regulatory body is faced with a number of significant challenges without necessarily enjoying the legitimacy or enforcement powers to shape an emerging area, and must meet potentially contradictory expectations. Perhaps the key tools for the co-regulator are the criteria that Ofcom must use in respect of designation under section 368B(9) of the Communications Act 2003 (inserted by SI 2979/2009): that the body is a fit and proper body, has consented to designation, has access to adequate financial resources, is sufficiently independent of service providers, and will have access to a set of principles (transparency, accountability, proportionality, consistency and 'targeted only at cases in which action is needed'). The principles reflect a new approach of setting out appropriate criteria in a statute, as well as an Ofcom statement that sets out its decision-making procedures when considering the case for adopting self-regulation or co-regulation in appropriate cases (Ofcom 2008).

## **2. Co-regulation through ATVOD**



ATVOD emerged during the Communications Bill debates in 2002, with the industry's interest being obvious: 'if it is effective, VOD will be free of detailed statutory requirements for content' (Tambini et al. 2008: 99). In the period between the Communications Act and the recent changes, ATVOD was described as having an extremely low profile, but also being the subject of praise from the European Commission (Woods 2008: 181–2). This early role for ATVOD was a broad one, including commercial transactions and consumer benefits (Tambini et al. 2008: 99); some of these services do not fall within ATVOD's new co-regulatory role. Its founders were cable or Internet service providers such as NTL and Kingston (Filkin 2005). On the other hand, other services such as mobile services, not within ATVOD's role to date, may now find themselves subject to it. Therefore, it is not an obvious situation of a self-regulatory system being co-opted or incorporated into the statutory system, but a more awkward transition between what we could call ATVOD 1.0 and ATVOD 2.0. The chair of ATVOD 1.0 criticized statutory and co-regulation as 'costly to tax payer and industry, bureaucratic, inflexible, slow moving, anachronistic, reactive, not pro-active' (Filkin 2005). ATVOD 2.0 itself recognizes the change, for example through a press release announcing its new Chair and appointments to 'the new ATVOD' (Association for Television on Demand 2010a). The current Board includes four 'industry members' who (at the time of appointment) worked for BT, Five, Sky and Virgin Media, as well as five others, including the CEO of the Advertising Association and a former 'Channel 4' news editor.

ATVOD's system of regulation is now based on notification, as anticipated by the 2009 Ministerial Statement and required under the amended Communications Act. It will now deal with complaints regarding these services, although as the system is only fully in place as of 20 September 2010, no complaints have been dealt with at the time of the completion of this article. Enforcement of complaints can include the publication of a statement, ceasing the

provision of a programme or reference to Ofcom for financial sanctions. For those services already in operation when the co-regulatory system came into force (18 March 2010), they were required to notify ATVOD of their service by the end of April. For new services, the requirement is to notify ATVOD in advance of the provision of the service (ten working days). If ATVOD is aware of a non-notified service, it can request information and, if the service is subject to the notification procedure (i.e. is an on-demand service for the purposes of the 2003 Act), can take initial action or refer the matter to Ofcom. Sanctions include financial penalties but ultimately the provision of a non-notified on-demand service is a criminal offence. So considering service providers such as PictureBox (a film-on-demand service available through cable, DSL and digital terrestrial television), Teachers TV (programmes about education available on a website) and 4oD ('Channel 4's catch-up and archive VOD service on its website and YouTube, as well as other platforms), all of which have notified their services in the first round of notification, they will have filed a notification on a prescribed form and paid the appropriate fee. It appears as if regulation will be of services such as 4oD rather than service providers like Virgin Media's on-demand offering as a whole, which includes 4oD and various other services. Although branding is argued to be important in the development of VOD business models (Ross 2009: 220), features such as designing a catalogue, providing a PIN facility, supplying age-related warnings or displaying a logo are unlikely to mean that the party engaged in such activities controls the content for the purposes of the new regulatory system (Ofcom 2009b: 32). Of course, if Virgin itself provides a VOD service – by aggregating content and making it available – it may be required to notify in respect of this services. Nonetheless, the interests of large service providers and small VOD content providers may not be the same.

#### **D. Issues relating to implementation**

Although it may seem that the situation is becoming relatively stable, the details of regulation as found in Ofcom and ATVOD documents may lead to further complications. Although the high-level question of the scope of the AVMSD was a major one during its debate, with some high-profile exclusions set out in its recitals (such as user-generated content), and the changes to UK legislation follow this quite closely, the United Kingdom and other states still have some work to do in providing a more predictable and understandable system for defining the limits of the on-demand audio-visual media service category. The current debate in the United Kingdom is best summarized by a comment in *Media Week* that the system for regulation on-demand services in the United Kingdom has the potential to affect the media industries ‘from radio to print, to pure-play Internet companies’ (Alps 2009b).

Some concerns have been expressed regarding audio-visual material made available on the Internet in conjunction with the website of a print publication (i.e. video on the website of a newspaper or magazine). The Press Complaints Commission has already made a move into this field (Press Complaints Commission 2007), and is listed as type E in the classification set out above. The Press Complaints Commission (PCC) is the self-regulatory institution that adjudicates on complaints about material in the publications that subscribe to the scheme. Its regulatory approach is different to that of Ofcom and of other self-regulatory bodies. The PCC Code is well known but the system has been criticized as lacking by some, most recently the Media Standards Trust (2009) and (to a lesser extent) the House of Commons Select Committee on Culture, Media and Sport. The former has expressed particular concerns about the differences between the PCC and the self-regulatory system of the Advertising Standards Authority (ASA) for non-broadcast advertising, arguing that on almost

every point, the ASA system is closer to the criteria for good regulation set out by the National Consumer Council. Although the system is one of self-regulation, with no statutory sanctions, it is indeed possible that the PCC is subject to judicial review and the Human Rights Act (e.g. Pinker 1999: 53), and it is indirectly recognized in statute through section 12 of the Human Rights Act (as a relevant ‘privacy code’).

A certain distinction between Ofcom and the PCC is already apparent. The chair of the latter has criticized (Luft 2009) the proposed (but now unlikely) role of the former in respect of independently funded news consortia (a scheme set out in the first version of but removed in late debate from what is now the Digital Economy Act). The particular concern in that case is about impartiality rules for audio-visual content – although this will not be an issue with the simple implementation of the AVMSD, as impartiality is not an aspect of the regulation of on-demand services. Nonetheless, the potential for Ofcom regulation of audio-visual content on ‘newspaper websites’ is still a very realistic one, as Ofcom does appear to recognize (2009b: 31). On balance, it is difficult to avoid this conclusion, as even the AVMSD exclusion is for ‘electronic versions of newspapers’ (recital 21 of the Directive), which is not enough to displace the notion that TV-like on-demand services must be regulated without reference to the ownership of the service or the other services provided by it. This does not mean that all audio-visual material found on a newspaper website will be subject to type B regulation, nor does it preclude type E regulation in general, but it does mean that some services may be within the scope of ATVOD, particularly as such services become more ambitious. If excluded in full, non-newspaper-affiliated services would certainly raise serious objections and have the ability to challenge the interpretation of the Directive.

A further question is that of content delivered through mobile phone networks. It was certainly the case in early statements regarding VOD self-regulation that there were two major players, ATVOD and the Independent Mobile Classification Board (IMCB). The IMCB came into existence as a response to the availability of rich audio-visual content through mobile networks after 2003, driven by UK mobile network operators (Marsden 2008: 149–150). In fact, it may have been possible to designate both ATVOD and the IMCB. A version of this approach is now in place under the Video Recordings Act, with the amendments made by the Digital Economy Act facilitating two designated authorities, one for video (BBFC, type C1) and one for video games (the Video Standards Council, type D). However, in the absence of this approach, those in the mobile industry have criticized both the designation of ATVOD (preferring to deal directly with Ofcom) and the scope of the regulatory system.

The issue here, again, is that of TV-like services. Mobile platforms are particularly suitable for what has been called ‘snack TV’ – short reports with a focus on news, sports and similar content (Lotz 2007: 67). This content will not necessarily be accessed through the open Internet, but through the ‘walled garden’ that a mobile provider may offer as a service to its customers. This was a particular issue in the early days of 3G mobile and is still a part of the mobile environment. Other services may be available on the Internet but customized for the mobile user. So are these services TV-like? Some reassurance may be offered by a new paragraph in the Scope Guidance that states that in a situation where ‘video content forms part of a wider content offering, which also features a range of non-video content’, this should not be regulated as an on-demand service.

The final issue is that of fees, a particular concern of small and local VOD operators. The ‘United for Local Television’ campaign, made up of proponents and operators of local television, argued that the proposed notification fee of £2500 was a ‘poll tax’ and a subsidy for large operators, and called for an exemption for small-scale providers (United for Local Television 2010). However, Ofcom and ATVOD decided to continue with a ‘flat rate’ approach, indeed increasing the amount from £2500 to £2900, on the grounds that fewer services would be required to notify ATVOD than initially expected (Ofcom 2010b). In conjunction with this announcement, the two organizations also invited small-scale providers to present information regarding their circumstances in writing. The key issue here is that there are many providers that may not object to complying with the very basic standards required by the AVMSD, but would be reluctant to pay the ATVOD fee. Therefore, the level of acceptance of the AVMSD is not only found in the debates regarding its drafting alone, but also in how the regulatory system operates in practice within a single jurisdiction.

### **E. Regulatory challenges**

With the warnings set out above in mind, we now turn to the broader challenges with regard to the regulation of on-demand services, relating to the Directive and its implementation. The purpose of doing so is to avoid a focus on ‘technical’ objections alone, and to consider the impact of technological and business developments on the implementation of a fixed system of regulation. The examples chosen are film, where the potential convergence between sale, rental and broadcast business models is important, and a number of new technologies and services, namely the use of the emerging technology of the digital personal video recorder by consumers and the development of business models for VOD.

## **1. Film: cinema to DVD to films-on-demand?**

The tradition of film regulation in the United Kingdom is a very different one to that of broadcasting. As noted above, it serves as a separate class (type C) in the system of audio-visual media regulation in the United Kingdom. The approach to cinema saw the self-regulatory British Board of Film Censors (as it was called) becoming an influential body, sometimes engaged in direct negotiation with film-makers over problematic scenes and, in the most part, supported by local authorities engaged in their statutory function of regulating cinemas through the Cinematographic Acts (now the Licensing Act 2003). Despite the origins of this function in the regulation of the physical premises of the cinema, it is still the legislative route by which cinema is regulated. Video, on the other hand, is the subject of a specific statutory regime, with the Video Recordings Act setting out the principles and major definitions, and day-to-day classification taking place through the BBFC. Under this system, the vast majority of video recordings must be classified prior to public release; the legislative objectives are achieved through the BBFC's designation as the responsible authority and ultimate enforcement through the criminal law. This is, in comparative terms, a significant form of prior scrutiny, and few EU states have such a system. It may be seen as an example of co-regulation (albeit lacking some features of the three clearly co-regulatory categories in Cave et al's terms), where the BBFC (with its industry origins) is independent of the State but closely connected to it through the primary legislation and the subsequent designation. The BBFC is subject to judicial review and the Human Rights Act, with an appeals procedure in place for VRA decisions, but is on the other hand not subject to the Freedom of Information Act and most other legislation pertaining to the public sector.

In this context, film distributed through non-physical means proves to be an interesting challenge. The legislative scheme of the VRA is based on controlling sale and supply. It is not dissimilar in this regard to the traditional approach to controlling obscene publications through cutting off supply, although it is more complex in providing for age ratings as well as the ultimate sanction of refusing classification and thus (effectively) banning it so far as legitimate channels are concerned. Although based on different assumptions, the regulation of cinema is based on the requirement that cinema premises be licensed by the local authority, although serving too as a means to control the viewing of content, whether by underage viewers or, in some circumstances, by anyone. Neither approach is self-evidently appropriate for online distribution, although it was some time before downloading full-length films was a realistic option for Internet users. This is not to say that alternative forms of film distribution were not explored; pay-per-view and near-VOD systems often used films as key selling points of the 'catalogue'. Now, though, classification of films is a major issue for VOD itself. The response of the BBFC was to create the BBFCOnline service, which uses the same standards as are applied for its statutory functions and even the same logos and identification cards, governed by contract between the BBFC and the content provider or VOD aggregator. Interestingly, the BBFC argues that classifications under the VRA (for physical video works) cannot be used for digital works by non-members of the BBFCOnline scheme (British Board of Film Classification 2010); an interesting approach that highlights the hybrid nature of the BBFC as a private body with public functions. Alongside various studios, some aggregators (e.g. LoveFilm, BT Online) are also members of the scheme.

During the UK Government consultation on VOD, the BBFC did put forward some detailed (but ultimately unsuccessful) arguments regarding its role. It requested a statutory role under the implementation of the AVMSD or by way of amendment to the VRA, arguing in



particular that some services ‘create a reasonable consumer expectation of ‘DVD style’ regulation rather than ‘TV style’ regulation’ (British Board of Film Classification 2008). Indeed, there remains some ambiguity about on-demand film services under the AVMSD, particularly as to whether they are sufficiently ‘TV-like’ to attract regulation. While some engaged in the film VOD business may see themselves as an alternative to video stores (whether for rental or purchase), there are of course a number of TV services (i.e. movie channels) that are based on nothing but films. As film remains a major part of VOD (particularly pure VOD rather than broadcaster catch-up), an exclusion would be a significant reduction in the remit of ‘new’ ATVOD. Ofcom explicitly rejected the DVD-shop analogy (2009b: 30). In 2009, ‘pure’ forms of VOD across the European Union saw 62% of the viewing time spent watching cinema films, both new and archive (Attentional 2009: 63). Those now in type B can of course continue to use BBFCOnline, but interesting questions may emerge as to any differences between types B and C. They will differ in terms of prior scrutiny (none for the former, required for the latter), but perhaps also the restrictions on content, as there is no textual correlation as between the VRA rules and the requirements of the AVMSD for on-demand services.

The move from video to DVD, for example, had an important impact on the sale of TV series, which was a negligible issue on VHS but has become a very significant revenue stream in the DVD world (Wasser 2008: 128). This has meant that TV content has had to be classified, in the United Kingdom at least, in order to be distributed in DVD format, although there is no legal difference between VHS and DVD from a regulatory point of view. In the other direction, producers such as Disney saw the availability of cable systems (pay-TV and on-demand) as a useful way to ‘replace the weakest link in the distribution chain’ of the video rental store (Epstein 2005: 103), and it is unclear whether on-demand will now have an

impact on the DVD market itself (Ross 2009: 223). The film industry has for some time used an approach of release ‘windows’, but the development of DVDs and now of on-demand services has had a measurable impact on the length of these windows and associated marketing and pricing strategies (e.g. Kim and Park 2008; Park 2006).

## **2. The personal video recorder**

As with film, reflections on new developments in television or on the ‘post-network’ age within the field of television studies tend to bring together a number of different services. Buonanno’s case study of *Curb Your Enthusiasm*, for example, refers to the development of alternatives to traditional broadcasting being DVD, personal video recorders (PVRs) and on-demand (2008: 61). As argued above, these fall into three distinctive legal categories: C1, A and B, respectively. A broader definition is that of Lotz, whose ‘post-network technologies’ are DVD, the Internet, VOD, PVR and mobile (2007: 50).

The PVR is a particularly interesting case. Although it can break the link between scheduling and viewing, with some users ceasing to watch live TV other than as an exception (Boddy 2004: 103), it is still firmly within the A category in terms of regulation. The device allows the user to record linear services for later consumption in a style that is definitively non-linear. Although the main difference between the two experiences in practical terms pertains to storage, the regulatory approach under the AVMSD system creates further separation. In the United Kingdom, it has been argued by a number of analysts that the primary forms of on-demand viewing, from the user perspective, are in fact the watching of recorded content on a PVR (Enders 2009) and catch-up of recently broadcast TV programmes (Alps 2009a, 2009b). This content is regulated (in fact) as linear under the Broadcasting Code in respect of

the former and (de facto) in the same fashion in respect of the latter. As the Directive refers to consumer expectations of regulatory protection, this point may prove to be a very significant one over time.

### **3. The VOD market**

There has been some development in the VOD market, with non-exclusive agreements between broadcasters or producers on one hand and third-party VOD providers on the other (Suter and Emsell 2009). However, broadcasters continue to place emphasis on catch-up VOD while service providers focus on aggregation. The next major development is expected to be YouView (formerly Project Canvas), an initiative from a group of partners including the BBC, BT, 'ITV' and TalkTalk. This project will facilitate VOD through Internet-connected set-top boxes and is designed, in a manner of speaking, to do for on-demand services what the Freeview project did for digital linear television. Although the earlier Project Kangaroo (joint VOD efforts from the BBC, 'ITV' and 'Channel 4') was prevented from going ahead by the Competition Commission, Project Canvas has managed to secure the cooperation of a number of different partners (although Sky and Virgin continue to criticize it), and the Office of Fair Trading has announced that it will not intervene at this stage. Meanwhile, the BBC iPlayer continues to be a successful service and the various forms of VOD in the United Kingdom continue to develop. However, it is not appropriate to say that on-demand audio-visual media is the only game in town. Even within VOD, the 'online' and 'TV' markets still operate in different fashions (Tambini et al. 2008: 37), with differing configurations of power and control. Regulation of VOD therefore does not happen in place of the 'old', but alongside it.

## F. Conclusion

The difficult birth of VOD regulation in the United Kingdom is an important step in the evolution of media regulation. On the basis of freedom of expression concerns and other factors, media is particularly suitable for or susceptible to ‘alternative regulatory instruments’ (Lievens 2006: 115) i.e. forms of regulation that are at least one step removed from political or partisan control, and the United Kingdom has seen a number of examples in place over a long period (Murray and Scott 2002: 492). Now, the focus should be on whether the system of regulation for audio-visual media is appropriate and, where there are multiple systems in place, how this will affect the development of different services. Marsden has set out, in the context of the regulation of the mobile Internet, three tests for workable co-regulation (2010). These tests are genuine dialogue (including *meaningful* consultation with non-governmental organizations and the public), a clear understanding of the system, and clear lines of accountability and monitoring. While the last of these, a persistent issue in relation to emerging forms of regulation, is somewhat catered for by various mechanisms included in the amended Communications Act and Ofcom’s subsequent agreements with ATVOD, the first two may still be said to be lacking, and the re-emergence of fairly fundamental concerns at the stage of the agreement of the fee structure for ATVOD is of particular concern.

It will not be until notifications and the first disputes are complete that we can say with anything approaching certainty that the scope of the regulatory system is the subject of an appropriate shared understanding. Shortly before this article went to press, ATVOD published its first directory of notified services, which demands a more thorough study, but it does appear that a wide range of service providers (including international operators) have notified their services to the new regulator. Many parties have pointed out the remarkably

short consultation periods adopted by Ofcom in respect of the various stages of the development of the ATVOD system, although the long delay between the agreed Directive and the introduction of appropriate secondary legislation (by no means confined to the United Kingdom) was a factor here. In this context, the scrutiny of the implementation of the AVMSD in the United Kingdom and the recent, current and predicted challenges for the new ATVOD can inform the review of specific forms of co-regulation. More importantly, the complexity of audio-visual media regulation in the United Kingdom and elsewhere needs to be highlighted, particularly as possible ‘gaps’ can appear as new services and platforms emerge.

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